THAMEEZ NISHA HASSEEM v. MAYBANK ALLIED BANK BHD

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
HASNAH MOHAMMED HASHIM FCJ
MARY LIM FCJ
HARMINDAR SINGH DHALIWAL FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 02(f)-73-09-2019(P)]
28 FEBRUARY 2023

Abstract – *Upon a successful establishment of the statutory limitation under the Limitation Act 1953 ('LA'), s. 340(4)(b) of the National Land Code ('NLC') is engaged, allowing for the determination of title or interest by operation of law. In effect, when a chargee fails to obtain an order for sale timeously or at all, or fail to file proceedings in court to obtain a valid and enforceable order for sale of the charged land within the limitation period as prescribed in s. 21(1) of the LA, a chargor is entitled to defeat the registered interest of the chargee pursuant to s. 340(4)(b) of the NLC and consequently obtain the return of the land title pursuant to s. 244(1) of the NLC read with O. 83 r. 1(1) of the Rules of Court 2012.*

LAND LAW: *Charge – Charge of land – Land charged as security for loan – Default of payment – Failure of chargee to obtain order for sale timeously – Period of limitation – Whether begins from date of failure to repay debt – Whether chargee barred by limitation to foreclose charged property – Whether chargor entitled to defeat registered interest of charge – Whether chargee must return issue document of title to chargor – Whether chargee ceased to have any estate or interest in land – Whether chargee's rights to enforce charge extinguished by operation of law – Whether chargor entitled to file proceedings to obtain declaratory judgment – National Land Code, ss. 244(1) & 340(4)(b) – Rules of Court 2012, O. 15 r. 16 & O. 83 r. 1(1) – Limitation Act 1953, s. 21(1)*

LIMITATION: *Period of limitation – Nature and legal effect – Charge of land – Land charged as security for loan – Default of payment – Failure of chargee to obtain order for sale timeously – Application of 12 years' limitation period to charge actions – Whether begins from date of failure to repay debt – Whether chargee barred by limitation to foreclose charged property – Whether chargor entitled to defeat registered interest of charge – Whether chargee must return issue document of title to chargor – Whether chargee ceased to have any estate or interest in land – Whether chargee's rights to enforce charge extinguished by operation of law – Whether chargor entitled to file proceedings to obtain declaratory judgment – National Land Code, ss. 244(1) & 340(4)(b) – Rules of Court 2012, O. 15 r. 16 & O. 83 r. 1(1) – Limitation Act 1953, s. 21(1)*

The appellant ('Thameez') was the administrator of the estate of the deceased, whose land was charged to Co-operative Central Bank Ltd by the first respondent ('Charijah'). The bank went into receivership and was later taken over by the respondent bank, MABB. Charijah was granted a power of attorney by the deceased in 1983 to manage the property. Charijah charged the said land as a security for a loan of RM240,000 that she obtained on 28 May 1984 but defaulted on repayment and an order for sale of the land was granted in 1991 after a statutory notice under s. 254 of the National Land Code ('NLC') (Form 16D) dated 16 July 1986 was ignored. In 2010, the order for sale was set aside by the High Court. Since then, no action was taken by MABB to enforce the said charge or to recover the loan from Charijah. Thameez wrote a letter in 2015 to MABB requesting for information on the status of the charge and the action that MABB had taken against Charijah. MABB did not respond to the said request which finally culminated in the filing of the originating summons in 2016 by Thameez against Charijah. MABB intervened and was subsequently made a party to the suit. At the High Court, Thameez claimed, as against Charijah, for a declaration that the estate of the deceased was entitled to be discharged and exonerated from the liability under the charge; and for an order compelling Charijah to, *inter alia*, pay MABB the sum as required by MABB for the discharge of the charge and to pay damages for being in default to repay the loan that caused loss and damage to the estate of the deceased. These claims were dismissed by the High Court on the basis of the absence of an agreement between Thameez and Charijah in so far as the loan was concerned. Thus, Thameez had no cause of action to compel Charijah to repay the loan to MABB. The High Court also decided that MABB as the chargee was entitled to receive direct payment from the chargor for the discharge of the charge. As against MABB, Thameez prayed for, *inter alia*, a declaration that the chargee ceased to have any estate or interest in the land and that MABB's rights to enforce the charge had extinguished by operation of law; and an order that MABB execute a memorandum of discharge of the charge. The High Court dismissed this claim because 'equity and common sense dictate that the bank cannot discharge the charge until the debt is fully settled' despite the fact that the bank was barred by limitation to foreclose the charged property. The High Court was of the view that to rule otherwise would cause unjust enrichment to Thameez. On appeal, the Court of Appeal affirmed the decision of the High Court. Hence, this appeal. The questions of law that arose were (i) in the event the chargee failed to obtain an order of sale timeously or at all, was the chargor entitled to defeat the registered interest of the chargee pursuant to s. 340(4)(b) of the NLC and consequently obtain the return of the document of title free from the security pursuant to s. 244(1) of the NLC read with O. 83 r. 1(1) of the Rules of Court 2012 ('ROC') ('main question'); (ii) in the event a chargee failed to file proceedings in court to obtain a valid and enforceable order for sale of the charged land, pursuant to s. 256 of the NLC, within the limitation period prescribed in

s. 21(1) of the Limitation Act 1953 ('LA'), has the chargee's interest in the registered charge been thereby determined and/or extinguished by operation of law pursuant to, *inter alia*, s. 340(4)(b) of the NLC; ('question 2'); (iii) if the answer to question 2 above was in the affirmative, was the chargor's liability under the charge still subsisting? If the answer was that the chargor's liability under the charge was thereby not subsisting, must the chargee, in that event, duly return the issue document of title to the chargor pursuant to s. 244(1) of the NLC together with a duly executed registrable discharge of charge pursuant to, *inter alia,* O. 83 r. 1(1)(f) of the ROC ('question 3'); (iv) in the absence of any other statutory remedy available to the chargor against the chargee, whose interest in the registered charge had been determined and/or extinguished by its failure to exercise the remedies available to it under the relevant provisions of the NLC within the limitation period prescribed in s. 21(1) of the LA, was the chargor thereupon entitled to file proceedings in court to obtain a declaratory judgment (with or without ancillary relief pursuant to O. 15 r. 16 of the ROC), as was done by the appellant in the instant matter ('question 4'); (v) where a chargee intervened in an original action between the third party chargor and the actual borrower and the chargee was consequently added as a defendant in the action pursuant to O. 15 r. 6(2)(b) of the ROC which provides, *inter alia*, for the court to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, was the chargor thereupon entitled to contend in the said amended proceedings that the chargee's rights and/or interest in the registered charge have been determined and/or extinguished by operation of s. 21(1) of the LA ('question 5'); and (vi) ought this court revisit the Federal Court judgment in *CIMB Bank Bhd v. Sivadevi Sivalingam* (*'Sivadevi'*) which held, by a majority, that the proceedings by a chargee for sale of land, pursuant to ss. 256 or 260 of the NLC, were not subjected to s. 21(1) of the LA as well as that part of the minority decision of the same court which decided that the cause of action of the chargee to approach the court for an order of sale accrued upon the expiry of the period specified in Form 16D of the NLC and not from the date of the breach by the chargor to repay the loan and/or its instalments as stipulated in the charge documents ('question 6').

Held (allowing appeal)
Per Abang Iskandar PCA delivering the judgment of the court:

(1) When the statutory limitation period lapses and is successfully established, the court is legally empowered to determine the question of title or interest by operation of law in s. 340(4)(b) of the NLC – which determination had the effect on the indefeasibility or otherwise of the title or interest. The facts and circumstances of the present case illustrated the application of the statutory limitation in the operation of the 'determination of title or interest by operation of law.' (para 133)

(2) While statutory limitation is legally a defence, the peculiarity of the facts of each case must be examined in order to assess, whether Thameez invoked the limitation point as a defence or a cause of action. Herein, Thameez did not sue MABB, she sued Charijah. It was MABB who intervened for the protection of its alleged registrable right and interest in the land concerned. Upon intervening, MABB was made the second defendant, following which, necessary amendments were made to the pleadings. Thereafter, Thameez sought a declaration that the chargee ceased to have any estate or interest in the land and that MABB's rights to enforce the charge had extinguished by operation of law. Thameez was not, in these circumstances, using limitation as a sword but as a defence to MABB's claim that it had an interest in the property in question, that the claim at that time was barred by limitation. Thus, in light of O. 15 r. 6(2)(b) of the ROC, Thameez was entitled to contend in the said amended proceedings that the MABB's rights and/or interest in the registered charge had been determined and/or extinguished by operation of s. 21(1) of the LA. Question 5 was therefore answered in the affirmative. (paras 43-51)

(3) An order for sale is a statutory remedy provided by the NLC to the charge in respect of the charged land. That said, it must nevertheless be borne in mind that such statutory remedy could not be enforced without there being 'any application' first made to court according to the required procedure prescribed in O. 83 of the ROC. The cumulative effect of reading the relevant provisions in the NLC, ROC, LA and the Courts of Judicature Act 1964 means that the application for an order for sale pursuant to s. 256 of the NLC is an 'action' falling under the definition of 'action' in s. 21(1) of the LA. This court agreed with the case of *Sivadevi* on the three categories of action and the application of s. 21(1) of the LA to charge actions. Further, there was necessary modification made to the LA and that was in respect of the addition of the words 'to enforce such mortgage or charge' in s. 21(1) of the LA. Thus, the legislative history of the LA and the NLC supported the proposition that the limitation period of 12 years applied to charge actions. (paras 77, 78, 83, 103 & 105)

(4) There is a direct correlation between the 16D notice and the default in repayment – that the former could not be issued without the default in the loan repayment having been triggered first. And because certainty was important in the law of limitations, the date of the failure to pay was certain as compared to when the 16D notice was issued – for such issuance was dependent upon the chargee's discretion. Thus, the period of limitation in s. 21(1) begins from the date of the failure to repay the debt and not from the failure to remedy the 16D notice. In the upshot, this court differed from the *ratio* and the conclusions arrived at in

Sivadevi on the application of s. 21(1) of the LA and in respect of the commencement of the limitation period. This answered question 6. (paras 111-113)

(5) While MABB may theoretically be entitled to claim under the agreement, based on the charge created, its alleged rights or interests were nevertheless legally unenforceable by the lapse of the statutory limitation period. That meant, MABB could no longer bring an action in law to enforce or to claim what it regarded as the registrable rights or interest under the charge. Having discussed and justified the application of s. 21(1) of the LA to charge actions, this court was of the considered view that upon successful establishment of the statutory limitation under the LA, s. 340(4)(b) of the NLC was engaged, allowing for the determination of title or interest by operation of law. In effect, when a chargee failed to obtain an order for sale timeously or at all, or fail to file proceedings in court to obtain a valid and enforceable order for sale of the charged land within the limitation period as prescribed in s. 21(1) of the LA, a chargor was entitled to defeat the registered interest of the chargee pursuant to s. 340(4)(b) of the NLC and consequently obtain the return of the land title pursuant to s. 244(1) of the NLC read with O. 83 r. 1(1) of the ROC. Thus, this court answered the main question, question 2 and question 3 in the affirmative. (paras 121-124)

(6) The sources for the grant of declaration are found in the Specific Relief Act 1950, O. 15 r. 16 of the ROC and the inherent jurisdiction of the court. And because it is a declaration of right, there need not be established a cause of action. What needs to be shown is the interest in the issue at hand. The Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* stated that the existence of a statutory remedy was no bar to an action for a declaration. The peculiar circumstances of the present case entitled Thameez to file for a declaratory judgment against MABB when there was no statutory remedy available for her as a chargor. Question 4 was answered in the affirmative. (paras 125-130)

(7) Having answered the questions of law as per the above, this court made the order that the appellant was legally entitled for the return of the issue document of title. (para 134)

Bahasa Melayu *Headnotes*

Perayu ('Thameez') adalah pentadbir harta pusaka si mati, yang tanahnya digadai kepada Koperasi Central Bank Ltd oleh responden pertama ('Charijah'). Bank itu kemudian diambil alih oleh bank responden, MABB. Charijah diberikan surat kuasa oleh si mati pada tahun 1983 untuk menguruskan harta tanah. Charijah menggadaikan tanah tersebut sebagai jaminan untuk pinjaman RM240,000 yang diperolehnya pada 28 Mei 1984

A tetapi gagal membuat pembayaran balik dan perintah penjualan tanah tersebut telah diberikan pada tahun 1991 setelah notis berkanun bawah s. 254 Kanun Tanah Negara ('KTN') (Borang 16D) bertarikh 16 Julai 1986 tidak diendahkan. Pada tahun 2010, perintah jualan diketepikan oleh Mahkamah Tinggi. Sejak itu, tidak ada tindakan yang diambil oleh MABB
B untuk menguatkuasakan gadaian tersebut atau untuk mendapatkan kembali pinjaman daripada Charijah. Thameez menulis sepucuk surat pada tahun 2015 kepada MABB yang meminta maklumat mengenai status gadaian dan tindakan yang telah diambil oleh MABB terhadap Charijah. MABB tidak memberi apa-apa balasan terhadap permintaan tersebut yang akhirnya
C memuncak pada pemfailan saman pemula pada tahun 2016 oleh Thameez terhadap Charijah. MABB campur tangan dan kemudian dijadikan pihak dalam saman tersebut. Di Mahkamah Tinggi, Thameez menuntut terhadap Charijah satu pengisytiharan bahawa harta pusaka si mati berhak untuk dilepaskan dan dibebaskan daripada tanggungjawab bawah gadaian; dan untuk perintah yang mengarahkan Charijah, antara lain, membayar MABB
D jumlah yang dikehendaki oleh MABB untuk pelepasan gadaian dan membayar ganti rugi kerana kegagalan membayar balik pinjaman yang menyebabkan kehilangan dan kerugian pada estet si mati. Tuntutan ini ditolak oleh Mahkamah Tinggi atas dasar tiada persetujuan antara Thameez dan Charijah dalam isu pinjaman tersebut. Oleh itu, Thameez tiada kausa
E tindakan untuk mengarahkan Charijah membayar balik pinjaman kepada MABB. Mahkamah Tinggi juga memutuskan bahawa MABB sebagai pemegang gadaian berhak menerima pembayaran langsung daripada penggadai untuk melaksanakan gadaian tersebut. Terhadap MABB, Thameez menuntut, antara lain, perisytiharan bahawa pemegang gadaian tidak lagi
F mempunyai kepentingan ke atas tanah itu dan bahawa hak MABB untuk menguatkuasakan gadaian telah dihapuskan melalui operasi undang-undang; dan perintah agar MABB melaksanakan memorandum pelepasan gadaian. Mahkamah Tinggi juga menolak tuntutan ini kerana 'ekuiti dan common sense menetapkan bahawa bank tidak dapat melepaskan gadaian sehingga
G hutang diselesaikan sepenuhnya' walaupun bank dilarang oleh had masa untuk merampas hartanah yang digadaikan. Mahkamah Tinggi berpendapat bahawa keputusan sebaliknya akan menyebabkan pengkayaan tidak adil pada Thameez. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Oleh itu, rayuan ini. Persoalan undang-undang yang
H timbul adalah (i) sekiranya pemegang gadaian gagal mendapatkan perintah jualan tepat pada masanya atau tidak sama sekali, adakah penggadai berhak mematahkan kepentingan berdaftar pemegang gadaian menurut s. 340(4)(b) KTN dan seterusnya mendapatkan pemulangan dokumen hak milik yang bebas daripada sekuriti menurut s. 244(1) KTN dibaca bersama-sama dengan A. 83 k. 1(1) Kaedah-kaedah Mahkamah 2012 ('KKM') ('soalan utama');
I (ii) sekiranya seorang pemegang gadaian gagal memfailkan prosiding di

mahkamah untuk mendapatkan perintah sah untuk melaksanakan penjualan tanah yang digadaikan, menurut s. 256 KTN, dalam tempoh had masa yang ditetapkan bawah s. 21(1) Akta Had Masa 1953 ('AHM'), adakah kepentingan pemegang gadaian dalam gadaian yang didaftarkan telah ditentukan dan/atau dihapuskan oleh operasi undang-undang menurut, antara lain, s. 340(4)(b) KTN; ('soalan 2'); (iii) jika soalan 2 di atas dijawab secara afirmatif, adakah tanggungjawab penggadai bawah gadaian masih wujud? Sekiranya jawapannya adalah bahawa tanggungjawab penggadai bawah gadaian itu tidak wujud, haruskah pemegang gadaian, dalam keadaan tersebut, mengembalikan dokumen hak milik kepada penggadai menurut s. 244(1) KTN bersama-sama dengan pelepasan gadaian yang telah dilaksanakan dengan sewajarnya, antara lain, menurut A. 83 k. 1(1)(f) KKM ('soalan 3'); (iv) jika tiada remedi statutori undang-undang lain yang tersedia untuk penggadai terhadap pemegang gadaian, yang kepentingannya dalam gadaian berdaftar telah ditentukan dan/atau dihapuskan oleh kegagalannya menggunakan remedi-remedi bawah peruntukan KTN yang relevan dalam tempoh had masa yang ditetapkan bawah s. 21(1) AHM, adakah penggadai berhak memfailkan prosiding di mahkamah untuk mendapatkan keputusan deklarasi (dengan atau tanpa relief-relief sampingan menurut A. 15 k. 16 KKM), seperti yang dilakukan oleh perayu dalam perkara ini ('soalan 4'); (v) apabila pemegang gadaian campur tangan dalam tindakan asal antara penggadai pihak ketiga dan peminjam sebenar dan pemegang gadaian telah ditambah sebagai defendan dalam tindakan itu menurut A. 15 k. 6(2)(b) KKM yang memperuntukkan, antara lain, untuk mahkamah memastikan bahawa semua perkara yang dipertikaikan dalam kausa atau perkara itu boleh ditentukan dengan berkesan dan sepenuhnya dan diadili, adakah penggadai berhak untuk berhujah dalam prosiding yang dipinda bahawa hak dan/atau kepentingan pemegang gadaian dalam gadaian berdaftar telah ditentukan dan/atau dihapuskan melalui operasi s. 21(1) AHM ('soalan 5'); dan (vi) patutkah mahkamah ini menyemak semula penghakiman Mahkamah Persekutuan dalam *CIMB Bank Bhd lwn. Sivadevi Sivalingam* ('*Sivadevi*') yang berpendapat, melalui keputusan majoriti, bahawa prosiding oleh pemegang gadaian untuk penjualan tanah, menurut ss. 256 atau 260 KTN, tidak tertakluk pada s. 21(1) AHM serta bahagian keputusan minoriti mahkamah sama yang memutuskan bahawa kausa tindakan pemegang gadaian untuk memohon dari mahkamah perintah jualan terakru selepas tamat tempoh yang dinyatakan dalam Borang 16D KTN dan bukan dari tarikh kemungkiran oleh penggadai untuk membayar balik pinjaman dan/atau ansurannya seperti yang ditetapkan dalam dokumen gadaian ('soalan 6').

Diputuskan (membenarkan rayuan)
Oleh Abang Iskandar PMR menyampaikan penghakiman mahkamah:

(1) Apabila tempoh had masa statutori luput dan berjaya dibuktikan, mahkamah diberi kuasa undang-undang untuk menentukan persoalan hak milik atau kepentingan melalui kuat-kuasa undang-undang dalam s. 340(4)(b) KTN – yang mana penentuannya mempunyai kesan ke atas

ketaksangkalan atau sebaliknya tajuk atau kepentingan. Fakta dan keadaan kes ini menggambarkan pemakaian had masa statutori dalam operasi 'penentuan hak milik atau kepentingan melalui kuat kuasa undang-undang.'

(2) Walaupun had masa statutori adalah pembelaan sah, keunikan fakta setiap kes mesti diperiksa untuk menilai, sama ada Thameez menggunakan isu had masa sebagai pembelaan atau penyebab kausa tindakan. Di sini, Thameez tidak membuat tuntutan terhadap MABB, dia membuat tuntutan terhadap Charijah. MABB yang campur tangan untuk melindungi hak dan kepentingan yang boleh didaftar dalam tanah berkenaan. Setelah campur tangan, MABB dijadikan defendan kedua, setelah itu, pindaan perlu dibuat terhadap permohonan tersebut. Selepas itu, Thameez memohon pengisytiharan bahawa gadaian itu tidak lagi mempunyai sebarang kepentingan dalam tanah itu dan hak MABB untuk menguatkuasakan gadaian itu telah terhapus oleh operasi undang-undang. Thameez tidak, dalam keadaan ini, menggunakan had masa sebagai kausa tindakan tetapi sebagai pembelaan terhadap dakwaan MABB bahawa dia mempunyai kepentingan dalam hartanah yang dipersoalkan, bahawa tuntutan pada masa itu dihalang oleh pengehadan masa. Oleh itu, berdasarkan A. 15 k. 6(2)(b) KKM, Thameez berhak menghujahkan dalam prosiding pindaan tersebut bahawa hak dan/atau kepentingan MABB dalam gadaian berdaftar telah ditentukan dan/atau dipadamkan oleh kuat kuasa s. 21(1) AHM. Oleh itu, soalan 5 dijawab secara afirmatif.

(3) Perintah jualan ialah remedi statutori yang disediakan oleh KTN pada gadaian berkenaan tanah yang digadai. Walau bagaimanapun, perlu diingat bahawa remedi statutori sedemikian tidak boleh dikuatkuasakan tanpa 'sebarang permohonan' dibuat terlebih dahulu ke mahkamah mengikut prosedur yang diperlukan bawah A. 83 KKM. Kesan kumulatif membaca peruntukan yang berkaitan dalam KTN, KKM, AHM dan Akta Mahkamah Kehakiman 1964 bermakna bahawa permohonan untuk perintah penjualan menurut s. 256 KTN adalah 'tindakan' yang termasuk bawah takrifan 'tindakan' dalam s. 21(1) AHM. Mahkamah ini bersetuju dengan kes *Sivadevi* mengenai tiga kategori tindakan dan permohonan s. 21(1) AHM untuk tindakan gadaian. Selanjutnya, mahkamah ini mendapati bahawa terdapat pengubahsuaian yang perlu dibuat pada AHM dan berkenaan dengan penambahan perkataan 'untuk menguatkuasakan gadai janji atau gadaian itu' dalam s. 21(1) AHM. Oleh itu, mahkamah ini berpuas hati sepenuhnya bahawa sejarah perundangan AHM dan KTN menyokong cadangan bahawa tempoh had masa 12 tahun digunakan untuk tindakan gadaian

(4) Terdapat hubung kait langsung antara notis 16D dan keingkaran dalam pembayaran balik – bahawa yang pertama tidak boleh dikeluarkan tanpa keingkaran pembayaran balik pinjaman tercetus terlebih dahulu. Dan kerana kepastian adalah penting dalam undang-undang pengehadan masa, tarikh kegagalan untuk membayar adalah pasti berbanding semasa notis 16D dikeluarkan – kerana pengeluaran tersebut bergantung pada budi bicara pemegang gadaian. Oleh itu, tempoh had masa dalam s. 21(1) bermula dari tarikh kegagalan membayar balik hutang dan bukan daripada kegagalan untuk meremedikan notis 16D. Kesimpulannya, mahkamah ini berbeza pendapat daripada *ratio* dan kesimpulan yang dicapai dalam *Sivadevi* mengenai pemakaian s. 21(1) AHM dan berkenaan dengan permulaan tempoh had masa. Ini menjawab soalan 6.

(5) Walaupun MABB secara teorinya berhak untuk menuntut bawah perjanjian itu, berdasarkan gadaian yang dibuat, hak atau kepentingan yang didakwanya bagaimanapun tidak boleh dikuatkuasakan secara sah kerana luputnya tempoh had masa statutori. Ini bermakna, MABB tidak lagi boleh membawa tindakan undang-undang untuk menguatkuasakan atau menuntut apa yang dianggapnya sebagai hak atau kepentingan boleh daftar bawah gadaian itu. Setelah membincangkan dan mewajarkan pemakaian s. 21(1) AHM untuk tindakan gadaian, mahkamah ini berpendapat bahawa apabila berjaya mewujudkan had masa statutori bawah AHM, s. 340(4)(b) KTN terus digunakan, membenarkan penentuan hak milik atau kepentingan melalui kuat kuasa undang-undang. Akibatnya, apabila pemegang gadaian gagal mendapatkan perintah jualan tepat pada waktunya atau tidak sama sekali, atau gagal memfailkan prosiding di mahkamah untuk mendapatkan perintah yang sah untuk melaksanakan penjualan tanah yang digadaikan dalam tempoh had masa yang ditentukan dalam s. 21(1) AHM, seorang penggadai berhak untuk mengalahkan kepentingan berdaftar pemegang gadaian menurut s. 340(4)(b) KTN dan seterusnya memperoleh pengembalian hak milik tanah menurut s. 244(1) KTN dibaca dengan A. 83 k. 1(1) KKM. Oleh itu, mahkamah ini menjawab soalan utama, soalan 2 dan soalan 3 secara afirmatif.

(6) Sumber untuk pemberian pengisytiharan didapati dalam Akta Relief Spesifik 1950, A. 15 k. 16 KKM dan bidang kuasa sedia ada mahkamah. Dan kerana ini adalah pengisytiharan hak, tidak perlu dibuktikan sebab tindakan. Apa yang perlu ditunjukkan ialah kepentingan terhadap isu yang dihadapi. Mahkamah Persekutuan dalam kes *Pengarah Tanah Dan Galian, Wilayah Persekutuan lwn. Sri Lempah Enterprise Sdn Bhd* menyatakan bahawa kewujudan remedi statutori bukan penghalang pada tindakan untuk pengisytiharan. Oleh itu, mahkamah ini berpendapat bahawa keadaan unik kes ini melayakkan Thameez memfailkan

penghakiman pengisytiharan terhadap MABB apabila tiada remedi statutori tersedia untuknya sebagai penggadai. Soalan 4 telah dijawab secara afirmatif.

(7) Setelah menjawab persoalan undang-undang seperti di atas, mahkamah ini membuat perintah bahawa perayu berhak di sisi undang-undang untuk pengembalian pengeluaran dokumen hak milik.

Case(s) referred to:

Affin Bank Bhd v. Mohd Kasim Ibrahim [2013] 1 CLJ 465 FC ***(refd)***
AG v. HRH Prince Ernest Augustus of Hanover [1957] 1 All ER 49 ***(refd)***
Ali Hassan v. Bumiputra-Commerce Finance Bhd [2003] 6 CLJ 301 HC ***(refd)***
Australia And New Zealand Banking Group Limited v. Douglas Morris Investments Pty Ltd [1992] 1 Qd R 478 ***(refd)***
Beswick v. Beswick [1968] AC 58 ***(refd)***
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Chin Choy & Ors v. Collector Of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***
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CIMB Bank Bhd v. Sivadevi Sivalingam [2020] 2 CLJ 151 FC ***(dist)***
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Datin Siti Hajar v. Murugasu [1970] 1 LNS 23 HC ***(refd)***
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Fong Kong Meng & Anor v. PP [2019] 9 CLJ 301 FC ***(refd)***
Hall v. Hall [2018] VSC 131 ***(refd)***
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Jigarlal K Doshi Kantilal Doshi v. Resolution Alliance Sdn Bhd & Another Appeal [2012] 1 LNS 811 CA ***(refd)***
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Majlis Peguam Malaysia & Ors v. Joseph Au Kong Weng [1993] 2 CLJ 417 SC ***(refd)***
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Talam Corporation Bhd & Anor v. Bangkok Bank Bhd & Anor [2017] 2 CLJ 365 CA ***(refd)***
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A *Wan Zubaidah Wan Mahmood (As The Representative Of The Estate Of Nik Ab Rahman Nik Mat, Deceased) & Anor v. CIMB Bank Bhd [2019] 8 CLJ 197 CA* ***(refd)***
Wong Soon Kion v. CIMB Bank Bhd [2018] 1 LNS 1689 CA ***(refd)***
YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***
B *Yong Joo Lin & Ors v. Fung Poi Fong [1941] 1 LNS 102* ***(refd)***
Zulina Mohd Omar v. Public Bank Bhd [2018] 7 CLJ 586 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 16, 17
C Limitation Act 1953, ss. 2, 4, 21(1), (2), (4), 32
National Land Code, ss. 21(1), 244(1), 249(1)(a), 253, 254, 255, 256(2), (3), 257, 258, 259, 260, 261, 262, 263, 264, 265, 340(1), (2), (4)(b), 341, 447(1)
Rules of Court 2012, O. 1 r. 4(1), O. 5 rr. 1, 3, O. 15 rr. 6(2)(b), 16, O. 83 r. 1(1)(b), (f)

D Limitation Act 1939 [UK], s. 18
Limitation Act 1980 [UK], s. 20

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[Editor's note: For the Court of Appeal judgment, please see Thameez Nisha Haseem v. Charijah Ameerdin Mohamed Shariff & Anor [2019] 1 LNS 572 (overruled).]

Reported by Suhainah Wahiduddin

F

JUDGMENT

Abang Iskandar PCA:

The Questions Of Law

G **[1]** The initial sole question of law for this court's determination as granted at the leave stage is as follows:

> **Main Q1**
>
> In the event the Chargee fails to obtain an Order of Sale timeously or at all, is the Chargor entitled to defeat the registered interest of the
H Chargee pursuant to section 340(4)(b) of the National Land Code 1965 and consequently obtain the return of the issue document of title freed from the security pursuant to section 244(1) of the National Land Code 1965 read with Order 83 rule 1(1) of the Rules of Court 2012?

[2] Upon application by the appellant, five questions of law were later
I added for our determination. The further questions are as follows:

Additional Q2

In the event a Chargee fails to file proceedings in Court to obtain a valid and enforceable Order for Sale of the charged land, pursuant to section 256 of the National land Code 1965, within the limitation period prescribed in section 21(1) of the Limitation Act 1953 has the Chargee's interest in the registered charge been thereby determined and/or extinguished by operation of law pursuant to, *inter alia*, section 340(4)(b) of the National Land Code 1965?

Additional Q3

If the answer to Question 2 above is in the affirmative, is the Chargor's liability under the charge still subsisting? If the answer is that the Chargor's liability under the charge is thereby not subsisting, must the Chargee, in that event, duly return the issue document of title to the Chargor pursuant to section 244(1) of the National Land Code 1965 together with a duly executed registrable Discharge of Charge pursuant to, *inter alia*, Order 83 rule 1(1)(f) of the Rules of Court 2012?

Additional Q4

In the absence of any other statutory remedy available to the Chargor against the Chargee, whose interest in the registered charge has been determined and/or extinguished by its failure to exercise the remedies available to it under the relevant provisions of the National Land Code 1965 within the Limitation Period prescribed in section 21(1) of the Limitation Act 1953, is the Chargor thereupon entitled to file proceedings in Court to obtain a Declaratory Judgement (with or without ancillary relief pursuant to order 15 rule 16 of the Rules of Court 2012), as was done by the Appellant in the instant matter?

Additional Q5

Where a Chargee intervenes in an original action between the Third Party Chargor and the actual borrower and the Chargee is consequently added as a defendant in the action pursuant to Order 15 rule 6(2)(b) of the Rules of Court 2012 which provides, *inter alia*, for the Court to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, is the Chargor thereupon entitled to contend in the said amended proceedings that the Chargee's rights and/or interest in the registered charge have been determined and/or extinguished by operation of section 21(1) of the Limitation Act 1953?

Additional Q6

Ought this Honourable Court revisit the Federal Court judgment in *CIMB Bank Bhd v. Sivadevi Sivalingam* [2020] 2 CLJ 151 which held, by a majority, that the proceedings by a Chargee for sale of land, pursuant to sections 256 or 260 of the National Land Code 1965 are not subjected to section 21(1) of the Limitation Act 1953 as well as that part of the minority decision of the same Court which decided that the cause of action of the Chargee to approach the Court for an Order of Sale accrues upon the expiry of the period specified in Form 16D of the National Land Code 1965 and not from the date of the breach by the Chargor to repay the loan and/or its instalments as stipulated in the charge documents?

[3] My learned sisters Justice Hasnah Mohammed Hashim, Justice Mary Lim Thiam Suan and Justice Rhodzariah Bujang, and my learned brother Justice Harmindar Singh Dhaliwal had read this judgment in draft and they had indicated to me their agreement with it and that the same becomes the judgment of this court.

[4] Throughout the hearing of the appeal before us, learned counsel Mahinder Singh Dulku appeared for the appellant ("Thameez"), and learned counsel Lambert Rasa-Ratnam appeared for the respondent bank ("MABB").

The Facts And The Antecedent Proceedings

[5] Before dealing with the important questions of law, it is necessary, at the outset, to state briefly the relevant undisputed facts.

[6] Thameez is the administrator of the estate of Bee Fatima, the deceased. The deceased's land was charged to Co-operative Central Bank Ltd by Charijah (first defendant/respondent at the courts below). That bank went into receivership and was later taken over by MABB. Charijah was granted a power of attorney by the deceased in 1983 to manage the property. Charijah charged the said land as security for a loan of RM240,000 that she obtained on 28 May 1984. Charijah defaulted in repayment, and an order for sale of the land was granted in 1991 after a statutory notice under s. 254 of the National Land Code (Form 16D) dated 30 July 1986 was ignored. In 2010, the said order for sale was set aside by the High Court. Since then, no action was taken by MABB to enforce the said charge or to recover the loan from Charijah.

[7] Thameez wrote a letter in 2015 to MABB requesting for information on the status of the charge and the action that MABB has taken against Charijah. MABB did not respond to the said request. That finally culminated in the filing of the originating summons in 2016 by Thameez against Charijah. MABB intervened and was subsequently made a party to the suit as the second defendant and Charijah as the first defendant. Necessary amendments were made to the pleadings by virtue of the inclusion of MABB to the suit as one of the defendants.

[8] At the High Court, Thameez claimed, as against Charijah, for a declaration that the estate of the deceased is entitled to be discharged and exonerated from the liability under the charge; and for an order compelling Charijah:

(i) to pay MABB the sum as required by MABB for the discharge of the charge;

(ii) to pay to the court the sum sufficient for the discharge of the charge; or

(iii) to pay damages for being in default to repay the loan that causes loss and damage to the estate of the deceased.

[9] These claims were dismissed by the High Court on the basis of the absence of agreement between Thameez and Charijah in so far as the loan is concerned. Thus, Thameez has no cause of action to compel Charijah to repay the loan to MABB. The High Court was of the view that even if the court grants the order sought by Thameez, that order will be a useless order and cannot be enforced if Charijah refuses to comply because Charijah is entitled to raise the defence of limitation and because there was no demand by MABB.

[10] The High Court also decided that MABB as the chargee is entitled to receive direct payment from the chargor for the discharge of the charge. An order compelling Charijah to make payment to the court for the discharge of the charge is a curtailment of MABB's right, contrary to the terms of the charge itself.

[11] As against MABB, Thameez prayed for, *inter alia*, a declaration that the chargee ceased to have any estate or interest in the land and that MABB's rights to enforce the charge has extinguished by operation of law; and an order that MABB execute a memorandum of discharge of the charge.

[12] The High Court also dismissed this claim because "equity and common sense dictate that the bank cannot discharge the charge until the debt is fully settled" despite the fact that the bank is barred by limitation to foreclose the charged property. The High Court was of the view that to rule otherwise would cause unjust enrichment to Thameez.

[13] On appeal, the Court of Appeal affirmed the decision of the High Court and dismissed Thameez's appeal primarily upon reliance on the judgment of the Federal Court in *RHB Bank Bhd v. Wong Kok Leong & Wong Kok Sun & Anor* [2017] 6 CLJ 1; [2017] 4 MLJ 281 ("*Wong Kok Leong*") that rejected the use of limitation as a cause of action to seek a declaration that the defendant was barred by limitation from exercising its rights under the lienholder's caveats. The Court of Appeal was of the view that Thameez's application to get the title without payment of what is due and owing to MABB fails based on *Wong Kok Leong*.

Analysis Of The Issues Of Law

[14] Upon analysing the six questions of law, we found three issues that are primarily determinative of the present appeal. They are:

(i) determination of title or interest by operation of law;

(ii) the application of the 12 years' limitation period to charge actions; and

(iii) the nature and legal effect of the limitation period.

A

Determination Of Title Or Interest By Operation Of Law

[15] Section 340 of the National Land Code (NLC) deals with the conferment of indefeasibility of title or interest upon registration. However, sub-s. 4 provides for situations allowing (i) the exercise of any power as conferred by the NLC or other written law in respect of any land or interest; B or (ii) the determination of any title or interest by operation of law. It reads:

> **Section 340. Registration to confer indefeasible title or interest, except in certain circumstances**
>
> (1) The title or interest of any person or body for the time being registered C as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> ...
>
> (4) Nothing in this section shall prejudice or prevent:
>
> D (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> **(b) the determination of any title or interest by operation of law.** E (emphasis added)

[16] Thameez submitted that a chargor is entitled to defeat the registered interest of the chargee pursuant to s. 340(4)(b) of the NLC because the failure to act within the statutory limitation period under the LA 1953 activates the operation of the determination of any title or interest by operation of law. F

[17] Thameez argued that if legal rights were liable to be lost by delay or laches (*Re Jarvis* [1958] 2 All ER 336), what more if it was caused by the failure to act within the statutory limitation. Hence, as equitable defences such as laches, acquiescence and delay were considered by the Federal Court in *CIMB Bank Bhd v. Sivadevi Sivalingam* [2020] 2 CLJ 151 ("*Sivadevi*") as a G "cause to the contrary" in s. 256(3) of the NLC, this line of reasoning shall apply with equal force to the interpretation of "the determination of title or interest by operation of law". In other words, Thameez contended that the application of s. 340(4)(b) of the NLC is similarly activated when MABB did not act within the statutory limitation period. H

[18] In this respect, MABB agreed in principle that other legal and equitable defences are available to the defaulting chargor if the chargee bank takes forever to act or to enforce the charge, based on *Sivadevi*. However, it was submitted that this court must decline to entertain Thameez's argument on laches because this was not pleaded or raised in the amended OS or in I the affidavits and was not argued in the courts below. MABB argued that it is settled principle that a party should be barred from raising an issue for the first time on appeal (*Wong Kok Leong*).

[19] Additionally, as laches is an equitable defence which is statutorily acknowledged in s. 32 of the Limitation Act 1953 (LA 1953), its application is subject to equitable principles – that the "courts will not assist a litigant with unclean hands"; and that "he who seeks equity must do equity". Thameez was argued to have not fulfilled both equitable principles in order to apply the equitable defence of laches because she has not paid the outstanding amount, and yet is requesting for the return of the title deeds (*Phileoallied Bank (Malaysia) Bhd v. Sakuntalathevy Manickavasagam* [2007] 1 CLJ 72; *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538).

[20] MABB further submitted that just as the defence of limitation, laches cannot be used as a sword to found a cause of action, and it equally cannot be used to extinguish rights. *Sivadevi* and *CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012 that were cited by Thameez stand only for the proposition that laches may be raised as a defence to oppose an order for sale, and not in an action to defeat the registered interest of the bank as chargee or to seek the return of the title. Hence, MABB as the registered chargee possesses indefeasible rights and interest in the land pursuant to s. 340(1) of the NLC.

[21] Further, MABB argued that s. 340(4)(b) of the NLC cannot by itself operates to determine any title or interest because it is merely a saving provision which provides for determination of any title or interest in land by operation of any other law. Thameez on the other hand argued that s. 340(4)(b) of the NLC is not a saving provision but a stand-alone substantive provision because it is not a new provision in the NLC. Its origin is traceable to s. 42(vi) of the Land Code 1928 (Cap 138). Moreover, its operation is not temporary. Reference was made to *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 ("*View Esteem*").

[22] There is also another point raised in respect of the interpretation of the application of s. 340(4)(b) of the NLC. MABB contended that this provision applies only to matters which occur prior to or at the time of registration of title or interest – just as when the court is considering the vitiating categories in s. 340(2) of the NLC which cannot be construed in isolation and divorced from other provisions of the section.

Meaning Of "By Operation Of Law"

[23] At the outset, it needs to be stated that s. 340(4)(b) of the NLC is not a saving provision, as alleged by MABB. It is a substantive provision dealing with matters related to indefeasibility.

[24] As was stated by the Federal Court in *View Esteem*, a saving provision, just like a transitional provision, preserves some existing legal rule or right from its operation, and is basically temporary in duration. It was held that:

A [29] … The object of a saving provision is clear enough that is not to interfere with existing rights. In *Re Thompson Bedford v. Teal* (1889) 45 Ch D 161, Cotton LJ observed (at p 173):

> A saving clause as a general rule is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from interfering with rights already acquired.

B

[30] A saving provision narrows the application of the new act and not enlarge it. In *Lim Phin Khian v. Kho Su Ming* [1996] 1 MLJ 1; [1996] 1 CLJ 529 the Federal Court per Edgar Joseph FCJ observed (at p. 14 (MLJ); p. 538 (CLJ)):

C

> It is a well-known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation.

D [31] The saving provision is also a transitional provision. It is essentially temporary in duration and would become spent in the course of time in tandem with the new act which deals with the new circumstances.

[25] The meaning and application of s. 340(4)(b) of the NLC was explained by Gopal Sri Ram JCA in the Federal Court case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94 (E "*Krishnadas*"). In this case, His Lordship applied the cases that interpreted the then s. 42 of the FMS Land Code (Cap 138), the precursor of s. 340(4)(b) of the NLC because His Lordship was of the view that the difference in language between the two sections does not result in any difference in meaning or consequence; hence, the cases that have interpreted s. 42 of the F Land Code may safely be relied upon when construing s. 340 of the Code. Then s. 42 provides that:

> 42(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.
>
> G …
>
> (vi) Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law.

[26] In arriving at his conclusion, His Lordship cited *Yong Joo Lin & Ors v. Fung Poi Fong* [1941] 1 LNS 102; [1941] MLJ 63; and *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224 (H "*Ong Chat Pang*") and concluded that:

> In our judgment, *Parliament enacted s. 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s. 340 of the Code.* While recognizing that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating

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categories specified by the second subsection, may yet come within the scope of s. 340(4)(b), we cite, by way of illustration only, cases decided under the Moneylenders Act 1951. (emphasis added)

[27] Similar approach is seen in *Datin Siti Hajar v. Murugasu* [1970] 1 LNS 23; [1970] 2 MLJ 153 ("*Datin Siti Hajar*") where Syed Agil Barakbah J expressed his view that:

> Both sections 42 and 340 deal with indefeasibility of registered titles but the latter is wider in its terms as to include easements. In this connection, I am in agreement with what Horne J said in *Yong Joo Lin*'s case on page 75 (reprint p. 64), in dealing with almost the same point:
>
> > Mr. Shearn's arguments follow more or less the grounds of appeal. I reject his argument that section 42(vi) of the Land Code lets in the application of the common law. *In my view an indefeasible title means a title which cannot be made null and void in the first place by anything and then only by the provisions creating exceptions. A defeat by operation of law therefore means a total defeat.* (emphasis added)

[28] In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77, the Supreme Court ruled that s. 340(4)(b) of the NLC is one of the exceptions to indefeasibility which may be established as a category of cases falling under the "cause to the contrary" in s. 256(3) of the NLC. It held that:

> In our judgment, 'cause to the contrary' within s. 256(3) may be established only in three categories of cases.
>
> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the Code establishes cause to the contrary.
>
> …
>
> In other words, *a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss. (2) and (4)(b) above will be held to have established cause to the contrary under s. 256(3).* (emphasis added)

[29] Based on these authorities, it is our considered view that s. 340(4)(b) of the NLC is far from being a 'saving' provision. The determination of any title or interest by operation of law at any point of time affects indefeasibility. With that in mind, we shall examine, whether s. 21(1) of the LA 1953 comes within the meaning and application of "by operation of law".

What Does The Limitation Act 1953 Deal With?

[30] The LA 1953 is an "Act to provide for the limitation of actions and arbitrations" but which shall not apply to "any action or arbitration for which a period of limitation is prescribed by any other written law or to any

A action or arbitration to which the Government or the Government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law."

[31] Originally, our limitation law was based on the Indian model. However, due to what was regarded as "complicated and obsolete" position
B of the then limitation law, an improvement was made by the enactment of the Limitation Act 1953, modelled on the English law of limitations. The Hansard during the second reading of the Limitation Bill 1952 recorded that:

> **A Limitation law should be clear as far as is possible, and as far as possible should apply uniformly in most types of actions.** Not only is
C the present law complicated, but it might also fairly be described as obsolete since – the law was passed in 1898 – **it does not really tie up in any way with our present Land system.**
>
> …
>
> The main principles of the Bill are three. First of all, the limitation for
D nearly all actions is fixed at six years. We sweep away this dodging about between one year and three years and six years formerly. **We have made the limitation period for actions to recover land 12 years, and we have made the period for actions to enforce a security 12 years** … But for all practical purposes there will be two periods of limitation – one of six years
E and one of 12 years. We hope by this means that we shall eliminate at one stroke a great mass of complicated law dealing with causes of action.
>
> …
>
> The principal change – and the really important change of which I ask Council to approve – is that we have swept aside this vast complication
F of various types of action leading to interminable argument and in many cases gross injustice and **have substituted instead a simple and uniform system which can be clearly understood not only by lawyers but, more important really, by the public at large.** (emphasis added)

[32] The LA 1953 is therefore a law of general application, regulating the
G limitation period for commencing a cause of action – generally at either six or 12 years. It actually was actuated by the desire of the Government at that time, "to sweep aside this vast compilation of various types of action leading to interminable argument and in many cases gross injustice by substituting it with a simple and uniform system which can be understood" by all and
H sundry.

[33] The Supreme Court in *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409 stated the rationale for prescribing the period of limitation in the following manner:

> The doctrine of limitation is said to be based on two broad considerations.
I Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty

> or doubt or suspense. The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[34] On the purposes of limitation law, the English Court of Appeal in *Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd* [2005] 2 All ER 304 stated that:

> … Limitation statutes are intended to prevent stale claims, to relieve a potential defendant of the uncertainty of a potential claim against [him] and to remove the injustice of the increasing difficulties of proof as time goes by …

Limitation As A Defence Or A Cause Of Action

[35] The Federal Court in *Wong Kok Leong*, in citing with approval the decision of the Court of Appeal in *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812 ("*Sakapp Commodities*") held that limitation is merely a defence to an action and therefore cannot be used to found a cause of action.

[36] It was on this basis that MABB argued that Thameez's claim against MABB should fail because her reliance on the Limitation Act is legally wrong, misconceived and against the settled principle of law because the law of limitation operates as a procedural defence and cannot be relied on to found a cause of action.

[37] In response, Thameez argued that the failure of MABB to commence the action within the 12 years period gives Thameez an accrued right to plead a time bar just as any other statutory or contractual protection against a future suit. *Kenderaan Bas Mara v. Yew Bon Tew & Anor* [1979] 1 LNS 38; [1980] 1 MLJ 311 and *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; [1983] 1 MLJ 1 ("*Yew Bon Tew*") were referred to as the authorities to show that "there can be no distinction in principle between a right given by law to commence an action and defence given by law which bars an action" – that an "accrued right" to plead a time bar is in every sense a right, even though it arises under an Act which is procedural.

[38] Thameez further argued that she was not using the limitation as a cause of action as decided in *Sakapp Commodities*, but was resisting MABB's allegation that it has an interest in the property upon intervening in the original action. In other words, Thameez was mounting a defence to MABB's claim.

[39] In response, MABB contended that it intervened as a defendant, and not as the plaintiff, merely to defend Thameez's action – hence, MABB was protecting, as opposed to enforcing, its rights and interest under the charge that will be affected by the relief sought by Thameez in the original OS prior to intervention.

[40] As regards Thameez's reference to *Yew Bon Tew*, MABB argued that the facts in *Yew Bon Tew* must be distinguished and assessed in the context of the facts in that case when the Privy Council held an accrued right to plead a time bar is in every sense a right even though it arises under an Act which is procedural.

Our View

[41] In this respect, the Privy Council in *Yew Boon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; [1983] 1 MLJ 1 stated that although the limitation arises out of a procedural law, it is as much a "right" as any other statutory or contractual protection against a future suit. It is a defence mechanism available to a defendant with the following effects:

> … When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence …

[42] We note that s. 4 of the LA 1953 requires specific pleading of the limitation in an action. It states that:

> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[43] Bearing in mind that legal requirement, and while we agree that the statutory limitation is legally a defence, the peculiarity of the facts of each case must be examined in order to assess, whether Thameez invoked the limitation point as a defence or a cause of action. That is because, "every decision of the courts depends substantially on the peculiarity of each case as the facts would invariably be different and subject to different inferences leading to different opinions of the courts" (*Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301; [2019] 12 MLJ 110), even in a situation where the court is applying the same legal principles.

[44] In this case, Thameez did not sue MABB, she sued Charijah. It was MABB who intervened for the protection of its alleged registrable right and interest in the land concerned. Upon intervening, MABB was made the second defendant, following which, necessary amendments were made to the pleadings. Thereafter, Thameez sought for a declaration that the charge ceased to have any estate or interest in the land and that MABB's rights to enforce the charge has extinguished by operation of law.

[45] Order 15 r. 6(2)(b) of the Rules of Court 2012 ("ROC") provides the following:

(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:

…

(b) order any of the following persons to be added as a party namely:

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or …

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[46] The Court of Appeal in *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2008] 1 LNS 922; [2008] 6 MLJ 488 referred to *TSB Private Bank International SA v. Chabra & Anor* [1992] 2 All ER 245, that adding one as a party is necessary to ensure that matters be effectually and completely determined and adjudicated upon:

I considered that the presence of the company before the court was necessary to ensure that all matters in dispute in the cause or matter might be effectually and completely determined and adjudicated upon by adding the company as a party. I also considered that the position of the company fell within the broad provisions of O. 15 r. 6(2)(b)(ii) namely that there (*sic*) (they) could be joined as a party:

any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter … (emphasis added)

[47] The Federal Court in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121; [2008] 2 MLJ 622 essentially enunciated that an amended writ has to be made by the plaintiff if there exists an application under r. 6:

Furthermore, O. 15 is concerned with the very early stage of a proceeding, to have all the necessary parties in before the trial begins. Thus, r. 8 provides that, *when the order under r. 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance.* All these happen before the trial. (emphasis added)

[48] Thus, in our view, we agree with Thameez that MABB ought not to be permitted to contend that it was Thameez who brought proceedings against MABB. In other words, Thameez is not, in these circumstances, using limitation as a sword but as a defence to MABB's claim that it has an interest in the property in question, that the claim at that time was barred by limitation.

[49] As MABB in its application to intervene had mentioned that it had an interest over the property, this has resulted in Thameez, having no choice, but to use limitation as a defence against MABB. It is crucial to note that in the first place, Thameez commenced an originating summons against Charijah only. It was MABB, who on its own accord applied to intervene and subsequently was added as the second defendant/respondent in the courts below. We therefore agree with Thameez that O. 15 r. 6(2)(b) has resulted in MABB being stopped from contending otherwise.

[50] It is noteworthy that Thameez had no intention to commence an action against MABB. It was Charijah, whom Thameez initially commenced an action against. Inevitably, Thameez had to put up a defence against the contention by MABB who had asserted that they had an interest over the property.

[51] Thus, in our view, in light of O. 15 r. 6(2)(b) of the ROC, Thameez is entitled to contend in the said amended proceedings that the MABB's rights and/or interest in the registered charge have been determined and/or extinguished by operation of s. 21(1) of the LA 1953. Question 5 is therefore answered in the affirmative.

The 12 Years' Limitation Period - Does It Apply To Charge Actions?

What Does Sivadevi Decide?

[52] We begin by analysing the judgment of this court in *CIMB Bank Bhd v. Sivadevi Sivalingam* [2020] 2 CLJ 151 ("*Sivadevi*"). Interestingly, *Sivadevi* is the latest authority both for Thameez and MABB on the question of whether the limitation period of 12 years applies to charge actions.

[53] The reason being, although *Sivadevi* was a unanimous decision of a three-panel judge, the reasoning differs between Ahmad Maarop PCA on the one hand, and Rohana Yusuf FCJ with Mohd Zawawi Salleh FCJ on the other, when allowing CIMB's appeal. Ahmad Maarop PCA was of the view that the limitation period of 12 years applies to charge actions while Rohana Yusuf FCJ, concurred by Mohd Zawawi Salleh FCJ held otherwise. To appreciate the differences, there is a need to elaborate the facts and the reasoning of the learned Justices in *Sivadevi.*

[54] Briefly, the factual matrix in *Sivadevi* is this. The loan agreement entered into on 18 January 2000 was secured with a deed of assignment. Following the issuance of title to the land and in place of the deed of assignment, a third-party charge under the NLC over the land was presented and registered on 24 December 2014. It was not disputed that the last payment of the loan was made on 12 May 2003. On 20 November 2007, a judgment in default was entered. This was set aside by consent on 9 January 2012. By a letter dated 29 January 2016, a notice of default in Form 16D was issued but this was not complied with. On 8 August 2016, an originating summons ("OS") for an order for sale of the land was filed and allowed by the High Court.

[55] This decision was reversed by the Court of Appeal because it was of the view that the action was time-barred under s. 21(1) of the LA 1953. Further, the Court of Appeal decided that the computation of the period of limitation begins upon the failure to service the repayment and not upon the expiry of the period specified in the notice in Form 16D.

[56] At the Federal Court, the case was heard by a five-member panel. The decision of the Federal Court was reserved. When it was decided, two members had since retired and the appeal was allowed unanimously by the remaining three members – but on different grounds. Separate judgments were written. As stated earlier, one was by Ahmad Maarop PCA and the other by Rohana Yusuf FCJ, which was agreed to by Mohd Zawawi Salleh FCJ.

[57] In allowing the appeal by the bank, Ahmad Maarop PCA held that the period of limitation applies to charge actions, but the computation of time begins not from the failure to repay the loan but upon the failure to remedy the breach within the period specified in the notice in Form 16D. The stated reasons are:

(i) the OS applying for an order of sale of the land charged under the NLC comes within the ambit of an action "to enforce such mortgage or charge" in s. 21(1) of the LA 1953.

(ii) the nature of an application for an order for sale under the NLC is an enforcement of the chargee's rights of his statutory remedy against the chargor in default based on the registered charge. Reference was made to *Kandiah Peter Kandiah v. Public Bank Bhd* [1993] 4 CLJ 332 ("*Kandiah Peter*").

(iii) based on ss. 254 and 255 of the NLC and the decision of the Supreme Court in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805; the decision of the Federal Court in *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825; [2006] 1 MLJ 601; and the decision of the Court of Appeal in *Perwira Affin Bank Bhd v. Lim Weow* [1998] 4 CLJ 17; [1998]

3 MLJ 56 ("*Perwira Affin*"), Ahmad Maarop PCA held that "the right to receive the money accrued" in s. 21(1) of the NLC begins upon the failure of the chargor to remedy the default specified in the Form 16D notice.

[58] Rohana Yusuf FCJ, on the other hand, decided that the period of limitation in s. 21(1) of the LA 1953 does not apply to charge actions because:

(i) section 21(1) of the LA 1953 consists of two categories of action only – an action to recover money; and an action to recover proceeds of the sale of land or personal property. Her Ladyship was of the view that the part "to enforce such mortgage or charge" is to be read conjunctively with the action to recover money. This means that "to enforce such mortgage or charge" is not a separate action but relates to an action to recover money. This approach of interpretation was due to the existence of the punctuation comma appearing after the word "charge", which is considered to be significant in construing the real meaning of s. 21(1) of the LA 1953. Reference was made to the decision of the Supreme Court in *Dato' Mohamed Hashim Shamsuddin v. The Attorney-General, Hong Kong* [1986] 1 CLJ 377; [1986] CLJ (Rep) 89; [1986] 2 MLJ 112; and the decision of the Federal Court in *Sathiyamurthi v. Penguasa/Komandan, Pusat Pemulihan Karangan, Kedah* [2006] 4 CLJ 862; [2006] 6 MLJ 593 relating to the role of punctuation comma in a legal provision. Her Ladyship was of the view that s. 21(4) of the LA 1953 amplified such interpretation suggesting the distinction between actions to recover monies secured by a charge to that of an action to realise the charge security.

(ii) historical reason – that when s. 21(1) of the LA 1953 was enacted and even in the later introduction of the provisions relating to orders for sale under s. 256 of the NLC, Parliament had not provided any limitation period for those proceedings relating to orders for sale especially the fact that the summons filed to enforce orders for sale are not "actions". Her Ladyship took the view that since our s. 21 is substantially in *pari materia* with s. 20 of the UK Limitation Act 1980 – an updated version of s. 18 of the UK Limitation Act 1939, the fact that England does not subscribe to the Torrens system, by parity of reasoning, s. 18 of the 1939 subsequently reproduced in s. 20 of the 1980 could not have been envisioned to apply to a Torrens-based system. Likewise, it similarly could not have been foreseen that our s. 21(1) of the LA 1953, without the necessary modification, would cater to the provisions relating to orders for sale in the NLC.

(iii) an order for sale is not an action, nor is it a judgment, while s. 21(1) of the LA 1953 only applies to an action – an action to recover money secured by a mortgage or charge and has no application to the exercise of the statutory right of the charge under the NLC. *Peh Lai Huat v. MBF Finance Bhd* [2009] 5 CLJ 69; [2011] 3 MLJ 470 ("*Peh Lai Huat*"); *Kandiah Peter;* and *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 ("*Low Lee Lian*") were cited as the authorities for such proposition. Her Ladyship emphasised that an order for sale is merely an exercise of a statutory remedy as a chargee. Reference was made to *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193; [1988] 1 MLJ 257 ("*Dhanoa*"); *United Malayan Banking Corp Bhd v. Chong Bun Sun & Another Case* [1994] 2 CLJ 673; [1994] 2 MLJ 221 ("*Chong Bun Sun*"); *Wong Soon Kion v. CIMB Bank Bhd* [2018] 1 LNS 1689; [2018] MLJU 1847 ("*Wong Soon Kion*").

[59] In deciding that the defence of limitation under s. 21(1) of the LA 1953 is inapplicable to charge actions, Her Ladyship stated that if the bank takes forever to act or to enforce the charge, defences such as laches, acquiescence and other equitable defences may be pleaded against it, or to be raised as a cause to the contrary in resisting an application for an order for sale in s. 256(3) of the NLC (*Low Lee Lian; Phileoallied Bank (Malaysia) Bhd v. Sakuntalathevy Manickavasagam* [2007] 1 CLJ 72; [2007] 1 MLJ 581).

Past Decisions On The Applicability Of s. 21(1) Of The LA 1953

[60] In this regard, Thameez took the view that the reasoning and decision by Rohana Yusuf FCJ on the inapplicability of the limitation period to charge actions as being fatally flawed and premised upon an incomplete consideration of the law, partly because there was no reference to previous decisions that had consistently held s. 21(1) of the LA 1953 as being applicable to charge actions (Reference was made to *Lim Ban Hooi & Anor v. Malayan Banking Bhd* [2018] 6 CLJ 545 ("*Lim Ban Hooi*"); *Wan Zubaidah Wan Mahmood (As The Representative Of The Estate Of Nik Ab Rahman Nik Mat, Deceased) & Anor v. CIMB Bank Bhd* [2019] 8 CLJ 197 ("*Wan Zubaidah*"); *Sivakadatcham P Sethuram Vandayar v. CIMB Bank Bhd (Previously Known As Bumiputera-Commerce Bank Bhd)* [2019] 6 CLJ 504 ("*Sivakadatcham*"); *Sri Rimba Mentari Development Sdn Bhd v. Southeast Asia Special Asset Management Bhd (SEASAM)* [2019] 8 CLJ 322 ("*Sri Rimba Mentari*"); *Sakinah v. Kua Teong How* [1941] 1 MLJ 166 ("*Sakinah*"); *Hj Abdul Rahman & Anor v. Mahomed Hassan* [1917] AC 209 ("*Hj Abdul Rahman*"); and *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230) ("*Mahadevan*").

[61] MABB, on the other hand, argued that those cases referred to by Thameez concerned only with the issue when time starts to run for the purpose of limitation in respect of an order for sale application. In those cases, the attention of the court was not properly drawn to the applicable land law system in Peninsular Malaysia at the time when the LA 1953 was enacted.

Our View

[62] First and foremost, we must state that of all cases that were cited before us, it is only Rohana Yusuf FCJ agreed to by Mohd Zawawi Salleh FCJ in *Sivadevi*; and Abdul Aziz Mohamad JCA in *Peh Lai Huat* that decided s. 21 as being inapplicable to charge actions.

[63] Ahmad Maarop PCA in *Sivadevi* and the Court of Appeal in the rest of the cases – *Lim Ban Hooi; Wan Zubaidah; Sivakadatcham; Sri Rimba Mentari; Mahadevan; Perwira Affin; Jigarlal K Doshi Kantilal Doshi v. Resolution Alliance Sdn Bhd & Another Appeal* [2012] 1 LNS 811 ("*Jigarlal*"); *Wong Soon Kion*; and Gopal Sri Ram JCA in *Peh Lai Huat*, ruled that s. 21 of the LA 1953 does apply to charge actions. The only difference between those cases is in respect of the commencement of the period of limitation.

[64] In fact, as was highlighted by Thameez, pre-Merdeka cases such as *Sakinah* and *Hj Abdul Rahman* show that the then Limitation Enactment applies to matters relating to the enforcement of registered charge and/or mortgage in question in the Federated Malay States. The decision of the Privy Council in *Hj Abdul Rahman* was cited with approval by the Federal Court in *Mahadevan.*

[65] On the strength of the discussion presented in those authorities and the analysis of the relevant statutory provisions in the NLC, the LA 1953 and the ROC, we are of the considered view that s. 21(1) of the LA 1953 does apply to charge actions.

Section 21(1) Of The LA 1953 – Two Or Three Categories Of Action?

[66] At this juncture, it would be appropriate to restate the general principles of law applicable to the construction of a statutory provision. We are fully aware that "the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction of a statute …" (*Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177).

[67] And when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy (*AG v. HRH Prince Ernest Augustus*

of Hanover [1957] 1 All ER 49. The court must also look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself (*Queen v. Eduljee Byramjee* (1846) 3 MIA 468.

[68] In construing s. 21(1) of the LA 1953, we are also guided by what the Federal Court in *Chin Choy & Ors v. Collector Of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69 laid down as the rules of construction of statutory law. It states that:

> It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.
>
> > It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed, per Bayley J in *R v. Ramsgate (Inhabitants)* (1827) 6 B & C 712.

Defining "Action"

[69] Thameez argued that the word "action" in the LA 1953 includes the application for the order for sale of charged lands. In this respect, it was submitted that the cumulative effect of reading the relevant provisions in the NLC, the ROC, the LA 1953 and the Courts of Judicature Act 1964 ("CJA") means that an application for an order for sale pursuant to s. 256 of the NLC is an "action" in "court", hence an "action" under s. 21(1) of the LA 1953. Our attention was brought to ss. 256(2) and 447(1) of the NLC; s. 3 of the CJA; s. 2 of the LA 1953; and O. 83 r. 1(1)(b), O. 5 rr. 1, 3, O. 1 r. 4(1) of the ROC.

[70] Briefly, it was submitted that the phrase "any application for an order for sale" shall be made to the court in accordance to the law relating to civil procedure in s. 256(2), brings the application of the ROC – which law is given a statutory force by s. 447(1) of the NLC. Order 83, in particular, r. 1(1)(b) relating to the "sale of the charged property" is relevant. In this respect, O. 5 rr. 1 and 3 mandate that the "proceedings" relating to the application for an order for sale of charged property shall be begun by originating summons; and the meaning of "proceeding" as contained in O. 1 r. 4(1) of the ROC is "any proceedings whether in open court or in chambers and includes an application at any stage of a proceeding …". Thameez also highlighted ss. 16 and 17 of the CJA in respect of the making of the Rules of Court and the definition of "action", "cause" and "court" in s. 3 of the CJA. The definition of "action" in s. 2 of the LA 1953 includes "a suit or any other proceeding in a court of law".

[71] Hence, Thameez argued that without any intention of undermining the principle of *stare decisis*, decided cases should not be followed blindly, especially when having regard to the facts of each case, "…what is implied must not conflict with the express language of the statute" (*Chiu Wing Wa & Ors v. Ong Beng Cheng* [1994] 1 CLJ 313; *Lim Ban Hooi*).

[72] In contrast, MABB contended that when a chargee applies for an order for sale under the NLC, he is not commencing an "action", but is applying for statutory remedy for an order for sale as provided under the NLC (*Kandiah Peter; Dhanoa; Chong Bun Sun; Wong Soon Kion; Low Lee Lian; Peh Lai Huat; Jigarlal; VRKRS Chettaippah Chetty v. Raja Abdul Rashid Ibni Almerhum Sultan Idris* [1933] 1 LNS 111; [1933] 2 MLJ 18 ("*VRKRS Chettiappah*"). It was submitted that MABB as the creditor should be allowed to realise its security at any time to recover a debt due and owing – because an action on one hand and execution of a judgment on the other differs for the purpose of limitation (*Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd* [2005] 2 All ER 304).

[73] MABB argued further that there is a fundamental difference between an application for order for sale under the NLC and an action to enforce a charge. The former is essentially a proceeding to enforce a statutory right while the latter deals with an action to enforce a contractual right under the charge. Section 21(1) of the LA 1953 was submitted to apply only in the latter category which is an action *in personam*, and not an action *in rem* (*Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825; [2006] 1 MLJ 601).

[74] Additionally, MABB submitted that to construe s. 21 as providing three categories of action means a contradiction or redundancy of s. 21(2) and (4) which expressly govern limitation in respect of foreclosure action by a mortgagee. MABB argued that it is settled law that a statute should be interpreted harmoniously so as not to offend or render redundant other provisions of the Act (*Puganeswaran Ganesan & Ors v. PP & Other Appeals* [2020] 9 CLJ 326; [2020] 5 MLJ 659).

[75] Moreover, according to MABB, giving s. 21(1) of the LA 1953 a wide interpretation would result in an anomalous situation because that means an application for an order for sale in court is subject to the LA 1953 while a similar application in the land office is not – because "action" in s. 21(1) of the LA 1953 cannot be enlarged to include proceeding other than a suit or proceeding in a court of law (*Majlis Perbandaran Klang v. Generation Products Sdn Bhd* [2006] 2 CLJ 1151; [2006] 4 MLJ 635 ("*Generation Products Sdn Bhd*"); *Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v. Yeoh Oon Theam* [2017] 3 CLJ 557 ("*Yeoh Oon Theam*"). Therefore, according to MABB, the court must avoid a construction of statutory provision that will give rise to an inconsistent and anomalous result (*Majlis Perbandaran Seremban v. Tenaga Nasional Bhd* [2020] 10 CLJ 715; *Generation Products Sdn Bhd*; *Yeoh Oon Theam*).

[76] In response to this point, Thameez argued that the point of a land office title, *vis-à-vis* limitation was considered by the Court of Appeal in *Wan Zubaidah* where s. 21(1) of the LA 1953 was applied. There, the order for sale was set aside despite the title being a land office title.

Our View

[77] There is no dispute that an order for sale is a statutory remedy provided by the NLC to the chargee in respect of the charged land. (*Kandiah Peter; Dhanoa; Chong Bun Sun; Wong Soon Kion; Low Lee Lian; Peh Lai Huat; Jigarlal; VRKRS Chettiappah; M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294).

[78] That said, it must nevertheless be borne in mind that such statutory remedy cannot be enforced without there being "any application" first made to court according to the required procedure prescribed in O. 83 of the ROC. In this regard, we agree with the argument submitted by Thameez that the cumulative effect of reading the relevant provisions in the NLC, the ROC, the LA 1953 and the CJA means that the application for an order for sale pursuant to s. 256 of the NLC is an "action" falling under the definition of "action" in s. 21(1) of the LA 1953.

[79] In this regard, we are not persuaded by MABB that reading s. 21(1) of the LA 1953 widely will bring redundancy to s. 21(2) and (4) and would also result in an anomalous situation in respect of an order for sale at the land office, which was argued to be not subject to the LA 1953.

[80] First, we do not find any contradiction or redundancy when reading s. 21(1) of the LA 1953 as providing three categories of actions. While s. 21(1) is couched in general terms, s. 21(2) and (4) deal specifically with foreclosure action in respect of mortgaged personal property and of mortgaged land respectively.

[81] Similarly, there is also no anomaly in respect of the application for an order for sale in the land office because we observed that this aspect has been clarified by the Court of Appeal in *Wan Zubaidah* as highlighted by Thameez relating to the applicability of the LA 1953, with which we agree.

[82] In reaching the conclusion that the word "action" in s. 21(1) includes the order for sale of charged land, we have considered that the express word in a statute must be given its ordinary and literal meaning first and foremost, and when necessary, as in this case, to be read together with other relevant provisions within the same legislation and across other relevant legislations in order to define its meaning. In *Canada Sugar Refining Co Ltd v. R* [1898] AC 735 it was held that:

> Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

[83] Thus, we agree with Ahmad Maarop PCA in *Sivadevi* on the three categories of action and the application of s. 21(1) of the LA 1953 to charge actions.

The Role Of The Punctuation Comma

[84] Thameez submitted that the approach taken by Rohana Yusuf FCJ in restricting the categories of action in s. 21(1) of the LA 1953 into two categories instead of three by relying merely on the function of the punctuation comma, while ignoring the word "or" is wrong. Reliance was made to the Federal Court case of *Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd* [2017] 4 CLJ 24, where Arifin Zakaria CJ considered the word "or" appearing between the words "insufficient" and "void" in s. 340(2) of the NLC as bringing a disjunctive meaning.

[85] We agree, with respect, that in construing a statute, the existence or absence of punctuation marks is relevant. In fact, punctuation forms part of any statutory enactment and may be used as a guide to interpretation – that punctuation comma may result in either a disjunctive or conjunctive meaning of a statutory provision. (*Dato' Mohamed Hashim Shamsuddin v. The Attorney-General, Hong Kong* [1986] 1 CLJ 377; [1986] CLJ (Rep) 89; [1986] 2 MLJ 112).

[86] That said, we noted too that "normally, to determine the intent of the law, the court would look at a sentence from a purely grammatical point of view so that in construing a statute, the court will disregard a punctuation or will re-punctuate it if that be necessary, in order to arrive at the true purpose and natural meaning of the words employed (*Prithipal Singh v. Dato' Bandar, Kuala Lumpur And Golden Arches Restaurant Sdn Bhd (Interveners)* [1993] 4 CLJ 107; [1993] 3 MLJ 336).

[87] In this case, Her Ladyship had sufficiently justified the approach taken with the punctuation comma appearing after the word "charge" in s. 21(1) of the LA 1953. That said, we also agree with Thameez that ignoring the word "or" that appears prior to and post the words "to enforce such mortgage or charge" is improper in the circumstances.

[88] Guided by the rules of construction mentioned earlier, we find the need to examine the entire provision of s. 21 in order to holistically determine whether, the punctuation comma made the categories of action in that provision as two or three categories. This, taken together with other points – defining action, historical point and past decisions – brings us to a conclusive finding, with respect, that s. 21(1) deals with three categories of action and not two, as found by Rohana Yusuf FCJ.

The Historical Point

[89] Rohana Yusof FCJ held on the historical point that:

> when we enacted our s. 21(1) of the LA and later introduced the provisions relating to orders for sale under s. 256 of the NLC, the Parliament had not provided any limitation period for those proceedings relating to orders for sale especially the fact that summons filed to enforce orders for sale are not 'actions'.

[90] Thameez argued that such interpretation was not grounded on a full appreciation of the authorities and the legislative history of the LA 1953 and the NLC. Pre-1953 cases such as *Sakinah v. Kua Teong How* [1941] 1 MLJ 166; and *Hj Abdul Rahman & Another v. Mahomed Hassan* [1917] AC 209 proves the application of the law of limitations to charge actions.

[91] It was further submitted by Thameez that historically, when the LA 1953 was passed, the statutory land laws in force were the Land Code of the Federated Malay States ("LCFMS"); and the Conveyancing and Law of Property Ordinance for the Straits Settlements ("CLPOSS"). These laws provided for ways and means of enforcing charges or mortgages. LCFMS provided the creation and enforcement of charges – which remedy was by way of public auction; while CLPOSS allows the mortgagee to sell mortgaged property. It was also highlighted that these laws provided for different remedies for the charge. Significantly, the remedies provided in the LCFMS were reproduced substantially in the NLC in ss. 253 to 265.

[92] As for the period of limitation, the then Limitation Enactment 36 of 1933 was in force in the Federated Malays States when the LCFMS was in force; while the Limitation Ordinance, Chapter 16 was the applicable law for the Straits Settlement. There, different limitation periods apply.

[93] Hence, it was argued by Thameez that at the time of the passing of the Limitation Ordinance 1953, the enforcement of charges and mortgages were all subject to different limitation periods, hence the need to enact a uniform law on limitation.

[94] Secondly, Thameez also brought to our attention s. 341 of the NLC which specifically excludes the application of the LA 1953 in the given circumstances, evidencing the fact that when the NLC was enacted, the Legislature was very well aware of the provisions of the LA 1953 although Rohana Yusuf FCJ appeared to observe the contrary. Hence, it was argued that had the Legislature intended to exclude the operation of s. 21 of the LA 1953, it would have specifically enacted a provision for such exclusion.

[95] Another critical point raised by Thameez was in respect of the differences between then English Limitation Act 1939 and English Limitation Act 1980 with our LA 1953. And that is, on the words "to enforce such mortgage or charge" appearing in our LA 1953 but is absent in

A the English Limitation Acts 1939 and 1980. It was emphasised that the LCFMS recognised charges only and the CLPOSS recognised the English concept of mortgages, hence the LA 1953 was to cater for both. In view of this difference, Thameez argued that interpretation of s. 21(1) must be based on the express language of our LA 1953 and not the applicable law in
B England, an approach preferred by Rohana Yusuf FCJ.

[96] On this historical point, MABB argued that in order to properly construe the meaning and application of s. 21 of the LA 1953, it is important to have regard to the applicable land laws at the time (*Royal College Of Nursing Of The United Kingdom v. Department Of Health And Social Security* [1981]
C 1 All ER 545). MABB explained that prior to the introduction of the NLC, there were two different systems of land law applicable in Peninsular Malaysia – the Straits Settlement on one hand, and the Federated Malay States on the other. The former system provided for the creation of mortgage and the right to apply for foreclosure, while the latter system provided for
D a charge and the right to apply for public sale of the land. Hence, it was presumed that due to the existence of these two different systems of land law, that the words "mortgage", "foreclose" and "charge" were employed in s. 21 of the LA 1953.

[97] MABB further argued that it is settled law that limitation will only
E apply if it is expressly provided in the Limitation Act (*Australia And New Zealand Banking Group Limited v. Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478; *Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd* [2005] 2 All ER 304). So, it was urged upon us that the absence of an express provision in the LA 1953 governing an application for an order for sale must be
F acknowledged.

[98] Hence, it was argued that a reading of s. 21 of the LA 1953 as a whole suggests that Parliament has intended to draw a distinction between actions to recover monies secured by a charge and an action to realise the charge security.

G

Our View

[99] In this regard, Lord Reid in *Beswick v. Beswick* [1968] AC 58 as was cited by the Supreme Court in *Citibank NA v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325; [1993] 3 MLJ 449 held, in respect of resorting to legislative
H history as an aid to construction of a statutory provision that:

> In construing any Act of Parliament, we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there. But if they are capable of having more than one meaning we are, in my
I view, well entitled to see how they got there …

[100] Upon analysing parties' submissions, we found that the points raised by Thameez to be compelling. She successfully proved that even before the enactment of the LA 1953 and subsequently the NLC, the limitation law was applied in case of charged and/or mortgaged land. It was also shown to our satisfaction that the NLC, in particular, the part relating to charges and order for sale were essentially based on the Land Code for the FMS (Chapter 138).

[101] The Hansard during the second reading as referred to earlier by us also shows that land matters were well within the knowledge and contemplation of the drafter of the Bill.

[102] The other reasons put forward by Thameez which is crucial to our minds is the absence of the words "to enforce such mortgage or charge" in the English Limitation Act 1980 which was cited by Her Ladyship to be in *pari materia* with our LA 1953. In this regard, we reiterate that:

> the function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. (*Krishnadas*)

[103] Thus, we are of the considered opinion that the said difference must be considered because our LA 1953 was based on the English limitation laws, and such modification and/or addition to our LA 1953 brings, to our assessment, an added category of action in s. 21(1). Her Ladyship in fact stated that "Likewise, it similarly could not have been foreseen that our s. 21(1) of the LA, without the necessary modification, would cater to the provisions relating to orders for sale in the NLC." We found that there is necessary modification made to our LA 1953 and that was in respect of the addition of the words "to enforce such mortgage or charge" in s. 21(1) of the LA 1953.

[104] Another compelling finding was s. 341 of the NLC which specifically states the Limitation Act 1953 as being inapplicable in the circumstances mentioned therein. On this point, we agree with Thameez that if the Legislature intended to exclude the operation of s. 21(1) of the LA 1953, it would have specifically enacted a provision for such exclusion, in the same manner it had enacted s. 341 of the NLC.

[105] On this historical point, we are fully satisfied that the legislative history of the LA 1953 and the NLC support the proposition that the limitation period of 12 years applies to charge actions.

A **Computation Of Time**

[106] Thameez submitted that the computation of time when the limitation period begins is the date of default in repayment and not the date of failure to remedy the breach as in Form 16D. Reference was made to *Wan Zubaidah; Sivakadatcham; Lim Ban Hooi;* and *Sri Rimba Mentari*. MABB did not make any submission on this point because it took the stance that the LA 1953 is not applicable to charge actions.

[107] We have analysed the authorities mentioned in para. [62] above and found that four cases – *Peh Lai Huat; Wong Soon Kion; Perwira Affin;* and *Jigarlal* – favour the interpretation of the commencement of the limitation period from the 16D notice, while four others (excluding *Sivadevi* at the Court of Appeal's level) – *Lim Ban Hooi; Wan Zubaidah; Sivakadatcham;* and *Sri Rimba Mentari* decided that the limitation period begins from the date of default in repayment.

[108] In determining which stance to take, we are fully aware that what needs to be interpreted is the phrase "when the right to receive the money accrued" in s. 21(1) of the LA 1953. We had carefully considered the reasonings of the Justices in those cases cited in para. 106 above. Having done that, we found that, with respect, the Justices that decided that limitation period begins from the date of default in repayment provided detailed analysis of the statutory law and authorities as a basis for their stance on the issue.

[109] It is noted that the Court of Appeal in *Wong Soon Kion* and *Peh Lai Huat* referred to s. 21(2) of the NLC (that in respect of mortgage personal property) and not s. 21(1) when holding that the period begins from the 16D notice while the notice in that case was given pursuant to s. 256 of the NLC.

Our View

[110] Having considered those cases, we find ourselves in full agreement with the observation made by the Court of Appeal in *Lim Ban Hooi* on the direct correlation between the 16D notice and the default in repayment – that the former cannot be issued without the default in the loan repayment having been triggered first. There, it was stated that:

> Without the underlying contractual relationship, and absent of any breach, the chargee not only cannot but has no right to approach the court under the terms of the National Land Code and O. 83 of the Rules of Court 2012 for an exercise of the statutory right of sale. The right to pursue this statutory remedy is triggered by an event of breach or default in the underlying contractual agreement and in the terms of the charge …
>
> Sections 254-256 provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the court for the remedy of an order for sale of the charged land is still dependent on there being a

breach of the express or implied agreements. The express agreements are to be found in the charge documents, while the implied agreements are as provided under s. 249 of the National Land Code. As expounded by the Federal Court in *S&M Jewellery Trading Sdn Bhd v. Fui Lian-Kwong Hing Sdn Bhd*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge.

…

That right does not and cannot exist in a vacuum, isolated from the underlying contractual agreements reached between the parties. Even the National Land Code recognises those express agreements in ss. 249 and 253.

[111] We cannot but agree with the above observation because the 16D notice can never be issued without there being a default in repayment first. And because certainty is important in the law of limitations, the date of the failure to pay is certain as compared to when the 16D notice is issued – for such issuance is dependent upon the chargee's discretion. This point is what the Court of Appeal noted in *Lim Ban Hooi*:

[65] If the time period of 12 years runs only from when the chargee decides to issue the Form 16D notice and then only after the failure to remedy the default, as is suggested in the case of *Peh Lai Huat* and *Jigarlal*, the time requirements of 'at least one month or such other alternative period as may be specified in the charge' mentioned in s. 253, would have been rendered meaningless and of no effect. *If the time period of 12 years does not run from when the breach of the agreement took place whence the right to receive money accrued has been disaffected, a chargee may well decide not to do anything for the next 100 years, and still be in time to enforce the ad rem right of order of sale.*

[66] The laws of limitation are intended to protect the rights of all parties concerned. *These laws lend certainty and confidence to the enforcement and safeguarding of rights and remedies and recourse to the courts, preventing abuse through the principle of laches.* (emphasis added)

[112] Based on the foregoing, we are of the considered view that the period of limitation in s. 21(1) begins from the date of the failure to repay the debt and not from the failure to remedy the 16D notice.

[113] In the upshot, we have to, with great respect, differ from the ratio and the conclusions arrived at in *Sivadevi*, in particular by Rohana Yusuf FCJ on the application of s. 21(1) of the LA 1953, and by Ahmad Maarop PCA in respect of the commencement of the limitation period. This answers question 6.

What If Limitation Is Successfully Established?

[114] Thameez argued that when the limitation period is successfully established, MABB loses absolutely its statutory right to obtain an order for sale – an exclusive statutory right and remedy in the NLC (*Kimlin Housing*

Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274). The operation of s. 340(4)(b) of the NLC becomes activated resulting in MABB not being entitled to the custody of the issue document of title because the liability no longer subsists under the charge (s. 244(1) of the NLC). It follows that if MABB refuses to return the title deeds, Thameez is legally entitled to initiate a charge action pursuant to O. 83 r. 1(1)(f) of the ROC for a declaration under O. 15 r. 16 of the ROC (*YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253).

[115] In response, MABB argued that the discharge of the charge cannot be made until full realisation of the debt because the limitation law only bars the enforcement of rights and does not have the effect of extinguishing MABB's rights and interest under the charge (*Othman & Anor v. Mek* [1972] 1 LNS 103; [1972] 2 MLJ 158; *Ali Hassan v. Bumiputra-Commerce Finance Bhd* [2003] 6 CLJ 301).

[116] MABB further submitted that O. 83 r. 1(1) of the ROC cannot be relied on to seek a discharge of the charge and return of the title because this provision merely provides for the procedural requirements for foreclosure or redemption actions (*Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345; [2006] 5 MLJ 21).

[117] In this regard, Thameez contended that MABB's claim that the discharge of the charge cannot be made until full realisation of the debt is a re-introduction of the equity of redemption – a doctrine which has no place in a Torrens system *(Malayan United Finance Bhd v. Tay Lay Soon* [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292; *Talam Corporation Bhd & Anor v. Bangkok Bank Bhd & Anor* [2017] 2 CLJ 365; *Zulina Mohd Omar v. Public Bank Bhd* [2018] 7 CLJ 586).

[118] MABB responded that although *Tay Lay Soon* did not apply the doctrine of equity of redemption, it nevertheless held that a chargee is entitled to the custody of the title so long as the liability subsists pursuant to s. 244(1) of the NLC, and thereafter a chargor is obliged to pay the sum secured pursuant to s. 249(1)(a) of the NLC. MABB further argued that based on *Tay Lay Soon*, the right of the chargor is embodied in the provisions of the charge itself – that on the facts of the case, cl. 27 of the annexure to the charge provides that the charge shall not be discharged except on payment of all moneys secured.

[119] It was further argued that under both systems – English mortgage and Torrens system, the liability secured has to be paid before the title can be returned, free of the mortgage or charge. The distinction sought by Thameez between the two is of no assistance to her case (*Holmes v. Cowcher* [1970] 1 All ER 1224; *Hall v. Hall* [2018] VSC 131; *Othman & Anor v. Mek* [1972] 1 LNS 103; [1972] 2 MLJ 158).

Our View

[120] The Privy Council in *Yew Bon Tew* described a statute of limitations as either a procedural or substantive law. And we had, earlier referred to decided cases that stated the nature and purposes of the law of limitations – which are partly to prevent a claimant from sleeping on his/her alleged rights or interests, to prevent stale claims and to have a definite end to litigation.

[121] Thus, while MABB may theoretically be entitled to claim under the agreement, based on the charge created, its alleged rights or interests are nevertheless legally unenforceable by the lapse of the statutory limitation period. That means, MABB can no longer bring an action in law to enforce or to claim what it regarded as the registrable rights or interests under the charge.

[122] In this respect, we find the words of Syed Agil Barakbah J in *Datin Siti Hajar* as perfectly encapsulating the ultimate result when His Lordship said:

> In my view an indefeasible title means a title which cannot be made null and void in the first place by anything and then only by the provisions creating exceptions. **A defeat by operation of law therefore means a total defeat.** (emphasis added)

[123] Having discussed and justified the application of s. 21(1) of the LA 1953 to charge actions, we are of the considered view that upon successful establishment of the statutory limitation under the LA 1953, s. 340(4)(b) of the NLC is engaged, allowing for the determination of title or interest by operation of law.

[124] In effect, when a chargee fails to obtain an order for sale timeously or at all, or fail, to file proceedings in court to obtain a valid and enforceable order for sale of the charged land within the limitation period as prescribed by s. 21(1) of the LA 1953, a chargor is entitled to defeat the registered interest of the chargee pursuant to s. 340(4)(b) of the NLC and consequently obtain the return of the land title pursuant to s. 244(1) of the NLC read with O. 83 r. 1(1) of the ROC. We therefore answer the main question, question 2 and question 3 in the affirmative.

Declaratory Judgment – Is It Justifiable?

[125] At the outset, we must state that the sources for the grant of declaration are found in the Specific Relief Act 1950, O. 15 r. 16 of the ROC and the inherent jurisdiction of the court. Gopal Sri Ram JCA in *The Attorney General Of Hong Kong v. Zauyah Wan Chik & Ors And Another Appeal* [1995] 3 CLJ 35; [1995] 2 MLJ 620 stated that:

> Now, the jurisdiction of a Malaysian court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s. 41 of the Specific Relief Act 1950 …
>
> …

A The procedural adjunct to the statutory basis is to be found in O. 15 r. 16 of the Rules of the High Court 1980 …

…

The alternative basis for the grant of declaratory relief – a jurisdiction of great antiquity – is the inherent jurisdiction of the court: *Kuluwante (An infant) v. Government of Malaysia & Anor* [1978] 1 MLJ 92.

[126] The Federal Court in *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253; [2009] 4 MLJ 24 viewed that:

C Order 15 r. 16 is statutory authority for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought.

On this O. 15 r. 16, Abdoolcader J (as he then was) in *Sungai Wangi Estate v. UNI* [1975] 1 MLJ 136 stated that the rule has the widest application … It does not prescribe any procedure nor is it limited to any specific D matter. It applies to all proceedings for declaration … where no special procedure is laid down, the claim for a declaratory judgment is brought by way of writ.

Lee Hun Joe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1979] 2 MLJ 101 said: The prevailing view E seems to be that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion.

[127] Similarly, Abdoolcader J in the Federal Court case of *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 explained that:

F It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act 1950 deals with declaratory decrees and s. 41 thereof provides for the discretion of the court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted *totidem verbis* from s. 42 of the G Indian Specific Relief Act 1877 (now s. 34 of the Indian Specific Relief Act 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, s. 41 of the Specific Relief Act gives statutory recognition to a well-recognized type of declaratory relief and subjects it to a limitation but it cannot be deemed H to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it. The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of O. 15 r. 16 of the Rules of the High Court 1980 I which will then apply …

[128] And because it is a declaration of right, there need not be established a cause of action. What needs to be shown is the interest in the issue at hand. This is how Abdul Hamid Embong FCJ (delivering the judgment of the majority) has described in *Affin Bank Bhd v. Mohd Kasim Ibrahim* [2013] 1 CLJ 465; [2018] Supp MLJ 106:

> [15] *A declaration merely declares the right of the parties. As such, a person seeking for a declaratory judgment need not show or establish a cause of action. He merely needs to show his interest in the issue at hand* (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135). We agree with Siti Norma J (as Her Ladyship then was) in *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1988] 2 MLJ 604 when she made this finding on the standing of one seeking for a declaration:
>
> > The defendants have argued that this action is not maintainable by the plaintiff as it is not a party to the first agreement and being a stranger cannot sue on the agreement. I do not consider that this argument holds any merit as the plaintiff is not suing on the agreement as such but is trying to establish a right given to it under the agreement and to that extent, seeks a declaration that it is a tenant of the defendants. PW Young in his book on *Declaratory Orders* (2nd Ed) defines a declaratory judgment as one that does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order. These are:
> >
> > (1) there must exist a controversy between the parties;
> >
> > (2) the proceedings must involve a 'right';
> >
> > (3) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or '*locus standi*';
> >
> > (4) the controversy must be subject to the court's jurisdiction;
> >
> > (5) the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims;
> >
> > (6) the issue must be ripe, *ie* it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.
>
> All these six conditions are met by the facts of this case and there is therefore no merit to the defendants' contention that the plaintiff's claims cannot be maintained.
>
> [16] The basis for seeking the declarations here is for the court to declare those rights and entitlements of the respondent and any deprivation thereto pursuant to the alleged breach of contract by the appellant, had directly affected those rights and entitlements. The respondent was therefore a person with the proper *locus standi* to claim those rights. He was not a mere bystander nor a busybody. *In other words, so long as the respondent has a real or genuine interest in having his legal position declared, he can come to court to seek for a declaratory judgment.*
>
> (emphasis added)

[129] Interestingly, the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 stated that the existence of a statutory remedy is no bar to an action for a declaration. Through the words of Raja Azlan Shah AG CJ (Malaya), it was held that:

> In the first place it must be made clear that **the existence of a statutory remedy is no bar to an action for a declaration.** This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration: see *Pyx Granite* (*ante*). Secondly, all that a declaration does is to declare the rights of the parties … (emphasis added)

[130] Having cited these authorities, we are of the considered view that the peculiar circumstances of the present case entitled Thameez to file for a declaratory judgment against MABB when there is no statutory remedy available for her as a chargor. Question 4 is answered in the affirmative.

Conclusion

[131] The Supreme Court in *Majlis Peguam Malaysia & Ors v. Joseph Au Kong Weng* [1993] 2 CLJ 417; [1993] MLJU 568 reminded us when interpreting a statute that:

> … dislike of the effect of a statute has never been an accepted reason for departing from its plain language. Holt CJ said nearly three centuries ago "... and Act of Parliament can do no wrong, though it may do several things that look pretty odd" .... (See *City of London v. Wood*17) … Accordingly, even if one regarded the policy implicit in (the Act concerned) as open to criticism, (if) the statutory language is clear beyond doubt, (it) must prevail.
>
> (See *Stock v. Frank Jones (Tipton) Ltd., ibid* per Lord Edmund-Davies at p. 238).

[132] Guided by the rules of statutory construction mentioned herein, and upon due analysis of previous courts' decisions, we conclude that s. 21(1) of the LA 1953 applies to charges action, which date of commencement shall begin from the date of the default of repayment and not from the failure to remedy the Form 16D notice.

[133] When the statutory limitation period lapses and is successfully established, the court is legally empowered to determine the question of title or interest by operation of law in s. 340(4)(b) of the NLC – which determination has the effect on the indefeasibility or otherwise of the title or interest. The facts and circumstances of the present case illustrate the application of the statutory limitation in the operation of the "determination of title or interest by operation of law".

[134] Having answered the questions of law as per the above, we now make the order that the appellant is legally entitled for the return of the issue document of title. Accordingly, we make the following consequential orders:

(i) a declaration that the said third party charge and the said chargee (MABB) shall cease to have any estate or interest whatsoever in the said land and MABB's right to enforce the said third party charge has extinguished by operation of law;

(ii) an order that MABB do deliver to the appellant (Thameez) a discharge of the said third party charge, the duplicate charge, the issue document of title of the said land and any other related documents relevant for the purpose of effecting the registration of the discharge of the said third party charge to the appellant and/or to the appellant's solicitor within 30 days from today. To dispel any doubt, should the chargee fail to comply with this order, then the discharge of the said third party charge shall take effect by operation of law, that is, immediately upon expiry of the said 30 days.

[135] Premised on the above, we unanimously allow the appeal with costs of RM150,000 subject to allocator fees. The orders of the Court of Appeal and of the High Court are hereby set aside. Orders accordingly.